Supreme Court, U.S.
FILED
MAY 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1549 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

FRANK LEE, ET AL., PETITIONERS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

MARK I. ROSEN
Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

JOAN E. SMILEY
Senior Counsel

MICHAEL F. RUGGIO
ROBERT D. MCGILLICUDDY
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the statute of limitations for claims acquired by the FDIC from an insolvent financial institution begins to run on the date the FDIC is appointed conservator or receiver of the financial institution.

2. Whether, in an action by the FDIC against former officers and directors of a failed financial institution, federal common law governs the characterization of the FDIC's claims as sounding in tort or contract for purposes of determining the applicable limitations period.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Badaracco v. *Commissioner*, 464 U.S. 386 (1984)	4
Bradley v. *Richmond School Bd.*, 416 U.S. 696 (1974)	6
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943)	7
D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447 (1942)	6
E.I. Dupont de Nemours & Co. v. *Davis*, 264 U.S. 456 (1924)	4
FDIC v. *Bank of San Francisco*, 817 F.2d 1395 (9th Cir. 1987)	6, 7
FDIC v. *Blue Rock Shopping Center*, 766 F.2d 744 (3d Cir. 1985)	7
FDIC v. *Braemoor Assocs.*, 686 F.2d 550 (7th Cir. 1982), cert. denied, 461 U.S. 927 (1983)	6-7
FDIC v. *Cardona*, 723 F.2d 132 (1st Cir. 1983)	5
FDIC v. *First Interstate Bank*, 885 F.2d 423 (8th Cir. 1989)	5
FDIC v. *Galloway*, 856 F.2d 112 (10th Cir. 1988)	5

Cases – Continued: Page

FDIC v. *Hinkson*, 848 F.2d 432 (3d Cir. 1988) 5
FDIC v. *Hudson*, 673 F. Supp. 1039 (D. Kan. 1987) 5
FDIC v. *Niver*, Civ. No. 85-2642-S (D. Kan. Nov. 6, 1987) 5
FDIC v. *Palermo*, 815 F.2d 1329 (10th Cir. 1987) 7-8
FDIC v. *Petersen*, 770 F.2d 141 (10th Cir. 1985) 5
FDIC v. *Robertson*, Civ. No. 87-2623-S (D. Kan. July 24, 1989) 5
Santoni v. *FDIC*, 677 F.2d 174 (1st Cir. 1982) 8
United States v. *Cardinal*, 452 F. Supp. 542 (D. Vt. 1978) 3
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979) 7
United States v. *Limbs*, 524 F.2d 799 (9th Cir. 1975) 8
United States v. *Lovasco*, 431 U.S. 783 (1977) 6
United States v. *Neidorf*, 522 F.2d 916 (9th Cir. 1975), cert. denied, 423 U.S. 1087 (1976) . 8

Statutes:

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 212(a), 103 Stat. 232-233 (12 U.S.C. 1821(d)(14)) 6, 8
28 U.S.C. 2415 ..... 2, 3

Statutes – Continued: Page

28 U.S.C. 2415(a) 3, 8
28 U.S.C. 2415(b) 2, 3, 8
28 U.S.C. 2416 ..... 3, 4
28 U.S.C. 2416(c) 3, 5

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1549

FRANK LEE, ET AL., PETITIONERS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-23) is reported at 884 F.2d 1304. The opinion of the district court (Pet. App. 24-67) is reported at 705 F. Supp. 505.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1989. A petition for rehearing was denied on December 22, 1989 (Pet. App. 23a-23b). The petition for a writ of certiorari was filed on March 22, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1983, three financially troubled Oregon state banks, Metropolitan State Bank (Metropolitan), Independent Bank of Sandy (IBS), and Willamette Falls State Bank (Willamette Falls), were merged to form the United Bank of Oregon (UBO). UBO's board of directors was composed entirely of former directors of Metropolitan, IBS or Willamette Falls. In March 1984, the Oregon Superintendent of Banks declared UBO insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver of UBO. FDIC, as receiver, assigned to FDIC, in its corporate capacity, all UBO's claims against its officers and directors.

2. In February 1987, FDIC filed a complaint in district court against UBO's former officers and directors, alleging causes of action for breach of fiduciary duty, negligence, statutory violations, and indemnification (Pet. App. 36, 70-71, 77). Several of the defendants moved for summary judgment on the ground that FDIC's claims were barred by the three-year statute of limitations for tort actions brought by the United States or federal agencies. See 28 U.S.C. 2415(b).[1] The district court entered summary judg-

---

[1] Section 2415 of Title 28, U.S.C., provides, in relevant part:

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later * * *.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the

ment in favor of the defendants. The court, applying federal law, concluded that each of FDIC's asserted causes of action sounds in tort rather than in contract or quasi-contract, and therefore is subject to the three-year limitations period of Section 2415(b) rather than the six-year period of Section 2415(a). The court further held that the three-year period began to run when Metropolitan, IBS and Willamette Falls were merged to form UBO. Relying on *United States* v. *Cardinal*, 452 F. Supp. 542 (D. Vt. 1978), the court rejected the FDIC's arguments that the claims did not accrue until institution of the receivership, and that the statute was tolled while the defendants dominated UBO's board. Pet. App. 43-50. On motion for reconsideration, the district court reaffirmed its decision. *Id.* at 52-67.[2]

3. FDIC appealed and the court of appeals reversed. It held that the FDIC's claim for breach of fiduciary duty sounds in contract, and therefore is subject to the six-year limitation period of 28 U.S.C. 2415(a). Pet. App. 12-15. The court concluded that there is a "substantial question as to whether FDIC's claims sounded in tort or in contract," and stated that where such doubt exists, the longer period should apply. Pet. App. 11-13 (citing authorities). The court of appeals also held that the six-year period did not begin to run until the FDIC was appointed as receiver. *Id.* at 21-23. The court observed that 28 U.S.C. 2415 expressly makes the statute of limitations subject to the conditions of 28 U.S.C. 2416, and that Section 2416(c) provides that periods during which material facts are unknown and could not

---

complaint is filed within three years after the right of action first accrues * * *.

[2] The district court also dismissed the indemnity claims on the ground that the depositors had no direct claim against the former officers and directors. Pet. App. 36-38. The FDIC did not appeal this ruling.

reasonably be known to federal officials with responsibility to act must be excluded from the limitations period.[3] The court regarded the policy arguments as "fairly evenly balanced," but viewed this case as "particularly appropriate" for application of the principle that "[s]tatutes of limitations sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." Pet. App. 20-22, quoting *Badaracco* v. *Commissioner*, 464 U.S. 386, 391 (1984) (quoting *E.I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924)).

ARGUMENT

1. Petitioners contend that this Court should grant certiorari to resolve a purported conflict among the courts of appeals over when the statute of limitations begins to run on claims inherited by the FDIC from insolvent financial institutions (Pet. 7-15). Contrary to petitioners' contentions, the decision of the court of appeals is correct and does not conflict with any decision of another court of appeals. In addition, the issue has been recently and authoritatively resolved by Congress. Accordingly, further review by this Court is not warranted.

The court of appeals correctly held that the statute of limitations on claims of mismanagement against a bank's directors and officers does not begin to run until the FDIC is in a position to pursue such claims. As a practical mat-

---

[3] Section 2416 provides, in relevant part:

> For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which –
>
> * * * * *
>
> (c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances * * *.

ter, directors and officers will not authorize a suit against themselves while they remain in control of the bank. Consequently, the statute of limitations should not begin running while the potential defendants remain in a position to prevent the filing of a complaint. Understandably, no court of appeals has held to the contrary.[4] In addition, only one other court of appeals has considered the effect of Section 2416(c) on claims of wrongdoing obtained by the FDIC from a failed bank, *FDIC* v. *First Interstate Bank*, 885 F.2d 423, 434 (8th Cir. 1989), and that court agrees with the Ninth Circuit that the "FDIC's cause of action did not accrue until * * * the FDIC was appointed receiver." *Id.* at 434. In short, there is no conflict among the circuits as to the application of Sections 2415 and 2416(c) of Title 28 to directors' and officers' liability cases.

---

[4] The Eighth Circuit, the Third Circuit, and the First Circuit, as well as the Ninth Circuit in the instant case, have concluded that the statute of limitations does not begin to run until the FDIC is appointed receiver. *FDIC* v. *First Interstate Bank*, 885 F.2d 423 (8th Cir. 1989); *FDIC* v. *Hinkson*, 848 F.2d 432, 435 (3d Cir. 1988); *FDIC* v. *Cardona*, 723 F.2d 132, 134 (1st Cir. 1983). The Tenth Circuit, in cases not involving claims against officers and directors, has concluded that the statute of limitations begins to run on the date on which the cause of action first accrues, not when it is later acquired by the FDIC. *FDIC* v. *Galloway*, 856 F.2d 112, 115-117 (1988); *FDIC* v. *Petersen*, 770 F.2d 141, 142-143 (1985). Both *Petersen* and *Galloway* were FDIC actions to recover from guarantors amounts owing on defaulted promissory notes. Neither case suggests any reason why the banks could not be relied on to pursue claims against the guarantors; neither case involved claims against officers and directors who could not be expected to sue themselves while they remained in office. At least one district court within the Tenth Circuit has not applied the rule of *Petersen* and *Galloway* to FDIC claims against officers and directors for mismanagement. See *FDIC* v. *Hudson*, 673 F. Supp. 1039, 1042-1043 (D. Kan. 1987); *FDIC* v. *Niver*, Civ. No. 85-2642-S (D. Kan. Nov. 6, 1987); *FDIC* v. *Robertson*, Civ. No. 87-2623-S (D. Kan. July 24, 1989).

In any event, the issue petitioner raises is largely academic, because Congress has now specified the applicable rule in Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 232-233 (to be codified at 12 U.S.C. 1821(d)(14)). Section 212(a) of FIRREA expressly provides that the statute of limitations begins to run on the date of FDIC's appointment as conservator or receiver or on the date the cause of action accrues, whichever is later.[5] Section 212(a) of FIRREA now governs this case. See *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 715 (1974).

2. Petitioners also contend (Pet. 15-23) that the Ninth Circuit should have applied Oregon law to decide whether the FDIC's claims are more appropriately characterized as tort or contract claims, and that the courts of appeals are in conflict over whether state law or federal common law governs such determinations. Petitioners concede (Pet. 16 n.17) that the choice of law issue was not presented to the lower courts. For that reason alone, it should not be considered by this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, the court of appeals' decision is correct and does not create a conflict among the circuits. The appellate courts agree that federal law, not state law, governs the rights of the FDIC in this action. *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 456 (1942); *FDIC* v. *Bank of San Francisco*, 817 F.2d 1395, 1398 (9th Cir. 1987); *FDIC* v.

---

[5] Section 212(a) of FIRREA, 103 Stat. 232-233 (to be codified at 12 U.S.C. 1821(d)(14)(B)), provides in pertinent part:

> [T]he date on which the statute of limitations begins to run on any claim * * * shall be the later of—
>
> (i) the date of the appointment of the Corporation as conservator or receiver; or
>
> (ii) the date on which the cause of action accrues.

Braemoor Assocs., 686 F.2d 550, 553-554 (7th Cir. 1982), cert. denied, 461 U.S. 927 (1983). Where no federal statute provides the rule of decision in a case governed by federal law, courts must fashion federal common law. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367 (1943). In so doing, courts may either create a uniform federal rule or adopt relevant state law; the choice depends on considerations such as whether a uniform national rule is needed, whether adoption of state law would frustrate the objectives of federal programs, and whether adoption of a national rule would disrupt commercial relationships based on state law. See *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728-729 (1979).

Contrary to petitioners' assertions (Pet. 17-19), the cases cited in the petition do not demonstrate any conflict on a choice of law issue. Some of the cases cited by petitioners adopt state law as the federal rule of decision. See, *e.g.*, *FDIC* v. *Palermo*, 815 F.2d 1329, 1334-1335 (10th Cir. 1987) (applying Oklahoma law to determine the elements of fraud); *FDIC* v. *Braemoor Assocs.*, 686 F.2d at 554 (applying a presumption in favor of state law in suit to impose constructive trust on monies funneled to defendant by bank president). Other cases conclude that a uniform federal rule is necessary to answer the particular questions presented, see, *e.g.*, *FDIC* v. *Blue Rock Shopping Center*, 766 F.2d 744, 747-749 (3d Cir. 1985) (explicitly creating federal common law based on UCC to govern availability of particular defense to FDIC's action on negotiable instrument), or conclude that state law and federal common law lead to the same result, see, *e.g.*, *FDIC* v. *Bank of San Francisco*, 817 F.2d at 1398 (applying Uniform Commercial Code). Each of these cases employs the analysis outlined in *Kimbell Foods*, either explicitly, see *Braemoor Assocs.*, 686 F.2d at 554; *Bank of San Francisco*, 817 F.2d at 1398; *Blue Rock Shopping Center*, 766 F.2d at 747-748; *Palermo*, 815 F.2d

at 1335; or implicitly, see *Santoni* v. *FDIC*, 677 F.2d 174, 178 (1st Cir. 1982). There is no conflict between these decisions and the present case. Indeed, none of these cases even addressed whether a uniform federal rule should apply to the characterization of causes of action for limitations purposes.

In this case, the court of appeals correctly concluded that a uniform rule should govern the application of a federal statute of limitations to claims asserted by a federal agency in carrying out a nationwide federal program. Two leading cases on the choice between Section 2415(a) and (b), *United States* v. *Neidorf*, 522 F.2d 916, 919 (9th Cir. 1975), cert. denied, 423 U.S. 1087 (1976), and *United States* v. *Limbs*, 524 F.2d 799, 801 (9th Cir. 1975), both characterize claims for this purpose by reference to federal law. The *Neidorf* court concluded that when the United States brings suit, even if the substantive claim arises under state law,

> the limitation must be determined by reference to section 2415. The characterization of the claim as one in tort, contract or quasi-contract must also be a matter of federal law since the uniform limitations established by the statute would be compromised if limitations varied according to the labels attached to identical causes of action by different states.

522 F.2d at 920 n.6 (citation omitted).

Finally, even if Oregon law were applicable and characterized the FDIC's claims as sounding in tort rather than contract, the outcome of this case would be unchanged. This action was filed within three years of the FDIC's appointment as receiver, and Section 212(a) of FIRREA provides that the limitations period does not begin to run until the appointment of the FDIC. Thus nothing turns on the question whether the three-year period (for torts) or the six-year period (for contracts) applies in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MARK I. ROSEN
Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

JOAN E. SMILEY
Senior Counsel

MICHAEL F. RUGGIO
ROBERT D. MCGILLICUDDY
Counsel
Federal Deposit Insurance Corporation

MAY 1990

U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00909